

Respondent requests the Board to set aside and reverse the Order for Medical Treatment. First, respondent's counsel contends he was advised by claimant's counsel's staff that the April 17, 2008, preliminary hearing would be rescheduled to another date and that was the reason he did not attend that hearing. Accordingly, respondent alleges claimant violated the Workers Compensation Division's Practice and Procedure Guide in scheduling the April 17, 2008, hearing and thereby denied respondent an opportunity to be heard and present its evidence. Respondent also complains that the record does not reflect that claimant's attorney advised the Judge at the preliminary hearing that respondent's counsel was unavailable and that respondent's counsel had been advised

the hearing would be rescheduled. Next, respondent alleges the Judge granted claimant medical benefits that had not been requested by claimant before the hearing and, therefore, the Judge lacked the jurisdiction to decide claimant's request for medical care. And finally, respondent argues the Judge erred by authorizing a cardiologist to perform a surgery pre-check because there was no evidence to suggest claimant's recent chest pain was somehow related to her upper extremity injuries.

Conversely, claimant contends the Order for Medical Treatment should be affirmed as respondent is raising issues that were not presented to the Judge. Claimant argues she requested the medical treatment recommended by Dr. Leinwetter in a March 28, 2008, demand letter. Next, claimant argues the Board does not have jurisdiction to review respondent's allegations of lack of appropriate notice of the preliminary hearing as that is not one of the preliminary hearing issues that may be reviewed by the Board. In the alternative, claimant argues respondent had notice of the preliminary hearing and, yet, failed to file any objection to the hearing. Finally, claimant argues the surgery pre-check by the cardiologist is appropriate as it is incidental to the proposed bilateral carpal tunnel release surgeries.

The issues before the Board on this appeal are:

1. Does the Board have jurisdiction to review the issue whether respondent was denied due process because claimant misled respondent regarding rescheduling the date of the preliminary hearing or should the claim be remanded to the Judge to make the appropriate findings on that issue?
2. Was respondent denied due process or did claimant mislead respondent regarding rescheduling the preliminary hearing? And, if so, should the April 21, 2008, Order be set aside due to that conduct?
3. Did the Judge lack jurisdiction to enter the order for medical treatment with Dr. Leinwetter?
4. Did the Judge err by authorizing a cardiologist to perform a pre-surgery examination?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member finds and concludes:

Claimant alleges she developed bilateral carpal tunnel syndrome from the work she performed for respondent. At the April 17, 2008, preliminary hearing, claimant requested that Dr. M. M. Leinwetter be authorized, along with his referrals. She also specifically requested authorization to see a cardiologist, which Dr. Leinwetter recommended, before undergoing carpal tunnel release surgery. At the hearing claimant introduced a March 26, 2008, letter from the doctor, which read in pertinent part:

Natividad Vasquez is presently under our care at SCHA. She apparently is scheduled to undergo carpal tunnel release due to a work-related injury. Before her surgery, she needs Cardiology evaluation due [to] recent chest pain symptoms.¹

At the preliminary hearing, claimant introduced the Notice of Hearing it sent to respondent's attorney that indicated a preliminary hearing had been set for April 17, 2008. The certificate of mailing indicates claimant mailed a copy of the notice to respondent's attorney on February 28, 2008. Respondent, however, argues claimant's office was advised before the hearing was scheduled that respondent's counsel was not available on April 17, 2008. Respondent's counsel also contends that claimant's office advised the issue to be addressed at the preliminary hearing was mileage.

Respondent's counsel also alleges that upon receiving the Notice of Hearing his office immediately notified claimant's office that respondent's counsel was not available for an April 17, 2008, hearing. Moreover, respondent's counsel alleges his office was then advised that new dates for the preliminary hearing would be provided. Respondent's counsel alleges his office later contacted claimant's office, which once again advised respondent's attorney would be contacted with new dates for the preliminary hearing.

The Workers Compensation Act provides that parties are entitled seven days' notice before an application for preliminary hearing may be filed. The Act also provides that such notice must specifically identify the benefit or change the party is seeking to address at the hearing. Moreover, the parties are entitled to at least seven days' written notice of the hearing date.²

In addition, the Act generally provides that technical rules of procedure do not apply and the parties are to be given a reasonable opportunity to be heard and to present evidence.³ And suffice it to say, the Board has the authority and jurisdiction to review questions of due process arising from both preliminary and regular hearings.

¹ P.H. Trans. (Apr. 17, 2008), Ex. 1.

² See K.S.A. 44-534a.

³ See K.S.A. 2007 Supp. 44-523(a).

Respondent's counsel more than implies that claimant's attorney has violated the code of professional conduct by failing to advise the Judge the circumstances behind counsel's absence at the preliminary hearing. In his brief to the Board, respondent's counsel includes the following footnote:

Lawyers also have an independent ethical obligation to inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse. See Rule 226, KRPC, Preamble, Rule 3.3(d) and Rule 3.4.⁴

Based upon the seriousness of the allegations and the fact that respondent and/or the Judge may have been misled regarding the scheduling of the April 17, 2008, preliminary hearing, the undersigned finds this matter should be set for a hearing to take evidence and arguments regarding the issue of whether respondent's attorney was misled regarding scheduling of the preliminary hearing, and, if so, whether that conduct should nullify the April 21, 2008, Order.

But the Workers Compensation Act does not empower the Board to conduct evidentiary hearings. Instead, the Act limits the Board's jurisdiction to reviewing the issues that are first presented to the administrative law judges. The Act reads, in part:

There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.⁵

Consequently, this claim should be remanded to the Judge to conduct the hearing referred to above. And should the Judge determine respondent's attorney was misled regarding the scheduling of the April 17, 2008, hearing and that such conduct should nullify the preliminary hearing Order, all of the remaining issues should be subsequently addressed after giving the parties a reasonable opportunity to present their evidence and arguments.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a

⁴ Respondent's Brief at 5 (filed May 12, 2008).

⁵ K.S.A. 2007 Supp. 44-555c(a).

⁶ K.S.A. 44-534a.

preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, this claim is remanded to the Judge for further proceedings consistent with the above. The Board does not retain jurisdiction over this claim.

IT IS SO ORDERED.

Dated this ____ day of June, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: Conn Felix Sanchez, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge